No. 99-1926

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1999

GARY E. GIBSON, Warden,
Oklahoma State Penitentiary and,
THE ATTORNEY GENERAL OF THE STATE OF OKLAHOMA,

Petitioner,

v.

KENNETH EUGENE HOGAN,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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12 pp

CAPITAL CASE

r Denying the Writ

criminal defendant does not lose his right to a lesser included offense under Beck v. Alabama, 447 U.S. 625 (1980), merely because the jury retains the discretion to impose a punishment less than death. Beck's educe the risk of unwarranted capital murder convictions by providing a ption of convicting a defendant of a lesser included offense when . Petitioner's argument that the sentencing discretion of Oklahoma juries k inapplicable was rejected appropriately by the Circuit Court. This Court e indicated Beck is applicable to discretionary sentencing schemes.

Oklahoma Court of Criminal Appeals determined Beck applied to t's case. However, the state appellate court reasoned incorrectly that a e instruction was a "third-option" that satisfied the requirements of Beck. l reasoning, in conjunction with an improper analysis of the issue as a lted in a state court decision that was afforded no deference by the Tenth rt of Appeals, in accordance with the dictates of the Anti-terrorism and eath Penalty Act.

Parties to the Proceeding

n of the case reflects accurately all parties to this proceeding before this Court.

federal cases related to this action or this Petitioner.

ontents and Table of Authorities **Page**

sons for Denying the Writ 1

of all Parties to the Proceeding 1

le of Contents and Table of Authorities 1,2

Constitutional Provisions, Statutes, and Rules which Case Involves 3

cise Statement of the Case 4

ct and Concise Argument Amplifying the Reasons for nying the Writ 5

clusion 11

TABLE OF AUTHORITIES

FEDERAL CASES

Beck v. Alabama,
447 U.S. 625 (1980) 1,4,5,6,7,8,9,10,11

Blair v. Armontrout,
916 F.2d 1310 (8th Cir. 1990) 7,8

Hogan v. Gibson,
197 F.3d 1297 (1999) 4,9,10,11

Hooks v. Ward,
184 F.3d 1206 (10th Cir. 1999) 6,9

Hopkins,
118 S. Ct. at 1901-02 6

Hopkins v. Reeves,
524 U.S. 88 (1998) 6

Livingston v. Johnson,
107 F.3d 297 (5th Cir. 1997) 7

O'Rourke v. Endell,
153 F.3d 560 (8th Cir. 1998) 7

Schad v. Arizona,
501 U.S. 624 (1991) 6

Spaziano v. Florida,
468 U.S. 447 (1984) 5,6

Strickland v. Washington,
466 U.S. 668 (1984) 8

Terry v. Petsock,
974 F.2d 372 (3rd Cri. 1992) 7,8

STATE CASES

Hogan v. State,
877 P.2d 1157 (Okla. Crim. App. 1994) 10

FEDERAL STATUTES

U.S. Const. amends. VI, VIII, XIV 4

United States Code § 2254(d)(1) 3,10,11

(d) The Constitutional Provisions, Statutes and Rules which the Case Involves.

(1) Constitutional Provisions:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.
>
> *U.S. Const. amend. VI*;
>
> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.
>
> *U.S. Const. amend. VIII*;
>
> . . . nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> *U.S. Const. amend. XIV, § cls. 3, 4.*

(2) Statutes Involved:

Title 28, United States Code § 2254(d)(1):

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> **(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.**

(3) Rules Involved.

None.

(e) Statement of the Case.

A complete procedural history and relevant factual background concerning the instant case is set forth in the Opinion by the Tenth Circuit Court of Appeals, issued December 8, 1999. Hogan v. Gibson, 197 F.3d 1297 (1999). A copy of that opinion is attached to Petitioner's Petition for Writ of Certiorari. Petition at App. 1 - App. 30.

Facts Material to Consideration of the Questions at Issue

Respondent's trial attorney requested a lesser included offense instruction of first degree manslaughter. Trial counsel's theory was that Respondent's confession to police, the central piece of evidence relied on by the prosecution, provided a basis for the jury to infer reasonably that Respondent killed the victim during the heat of passion without a design to effect her death. The trial court denied the request and did not instruct the jury on first degree manslaughter, in violation of fundamental rights guaranteed to Respondent by the Constitution. U.S. Const. amends. VI, VIII, XIV. The trial court did, however, instruct the jury on self-defense.

During rehearing of the direct appeal, the state appellate court determined the trial court did not err by refusing to instruct on first degree manslaughter. Finding Beck applicable, the state appellate court determined the goal of Beck was satisfied, and that the jury was provided a "third option" by the trial court's instruction on self-defense.

(f) **Direct and Concise Argument Amplifying the Reasons for Denying the Writ.**

(1) ***Beck applies in Oklahoma and is not impacted by any particular sentencing scheme.***

Despite the assertions of Petitioner, Oklahoma's sentencing scheme, or any sentencing scheme for that matter, does not impact the applicability of Beck. The purpose of Beck is to protect against the imposition of unwarranted capital murder convictions, a guilt phase determination. While a Constitutionally unreliable death sentence is a central concern of Beck, the rule of Beck addresses a jury's decision making process in the first stage of a capital murder trial. It is during the first stage of a capital murder trial in which the lack of a lesser included offense instruction can result in an unwarranted capital murder conviction. The unwarranted conviction for a capital crime increases the potential risk for an unreliable, unconstitutional, sentence of death.

> [W]hen the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense – but leaves some doubt with respect to an element that would justify conviction of a capital offense – the failure to give the jury the "third option" of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction.

Beck, 447 U.S. at 637. Unwarranted convictions result in capital murder cases when juries are forced into an all or nothing decision. Contrary to Petitioner's assertion, the all or nothing decision is, pursuant Beck, a decision between a conviction for capital murder and acquittal.

The idea Beck applies regardless of sentencing scheme structure is a concept reaffirmed by this Court in cases following Beck. In Spaziano v. Florida, 468 U.S. 447 (1984), this Court reaffirmed the application of Beck even though the Florida sentencing scheme permitted sentencing discretion.

> We concluded [in Beck] that "[s]uch a risk cannot be tolerated in a case in which the defendant's life is at stake" and that "if the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction, [a State]

> is constitutionally prohibited from withdrawing that option from the jury in a capital case."

Spaziano, 468 U.S. at 454 (quoting Beck, 447 U.S. at 637-38). The importance of Spaziano in analyzing the applicability of Beck in Oklahoma has been recognized by the Tenth Circuit. Hooks v. Ward, 184 F.3d 1206, 1228-29 (10th Cir. 1999).

> [I]n *Spaziano*, the Court addressed Petitioner's *Beck* claim on the merits, despite the fact that the Court was well aware that Florida's sentencing scheme permitted the jury to recommend life instead of death.

Hooks, 184 F.3d at 1228-29. This Court's decision in Schad v. Arizona, 501 U.S. 624 (1991), is equally instructive on the issue of Beck's applicability. The principal holding of Schad is that Beck does not require more than one lesser included offense instruction. However, it is important to recall this Court applied Beck after finding the judge who sentenced Mr. Schad did so subsequent to a sentencing hearing. Schad, 501 U.S. at 629. Certainly, there would be no need to have a sentencing hearing if the judge did not have sentencing discretion. Therefore, Shad provides yet another indication by this Court that Beck applies to sentencing schemes that permit sentencing discretion.

Hopkins v. Reeves, 524 U.S. 88 (1998), is this Court's most recent discussion of Beck. Hopkins does nothing to advance Petitioner's inapplicability argument. There can be no debate about the crucial distinguishing factor separating Hopkins from Beck. This Court stated explicitly:

> The crucial distinction between *Beck* and this case, as noted, is the distinction between a State's prohibiting instructions on offenses that state law recognizes as lesser included, and a States' refusing to instruct on offenses that state law does not recognize as lesser included.

Hopkins, 118 S.Ct. at 1902 n.7. The rule from Hopkins is that there is no Beck issue, and therefore no Due Process violation, when a defendant requests instructions on crimes that are not lesser included offenses under state law. Hopkins, 118 S.Ct. at 1901-02. Hopkins fails to shed any

light on the issue presented to this Court by Petitioner. Spaziano, Schad, and Beck support the conclusion that a state's sentencing scheme does not effect the Beck analysis. Petitioner has provided no compelling reason for this Court to decide otherwise.

(2) ***The authority relied on by Petitioner fails to evidence a split in the Circuits and fails to support Petitioner's inapplicability argument.***

Petitioner relies primarily on four cases from three different Circuits to argue there is a split of authority regarding the application of Beck. Petitioner relies on Livingston v. Johnson, 107 F.3d 297 (5th Cir. 1997); O'Rourke v. Endell, 153 F.3d 560 (8th Cir. 1998); Blair v. Armontrout, 916 F.2d 1310 (8th Cir. 1990) and Terry v. Petsock, 974 F.2d 372 (3rd Cri. 1992). Careful examination of these cases reveals they are all distinguishable from the instant case and do not evidence a split among the Circuits.

The defendants in both Livingston and Blair were tried before juries that received lesser included offense instructions. Livingston, 107 F.3d at 312; Blair, 916 F.2d at 1326. Thus, Beck was not violated in either Livingston or Blair. Consequently, these cases fail to support Petitioner's position.

In alternative holdings, both Livingston and Blair propose the idea that Beck should not apply when sentencing discretion is provided during the second phase of a capital murder case. Livingston provides no reasoned basis for this proposition and supports the alternative inapplicability argument with a passing, and inaccurate, interpretation of Schad. Schad, of course, does not support the inapplicability argument advanced in Livingston. Shad indicates, contrary to the position taken by the court in Livingston, that sentencing discretion is not a bar to the application of Beck. The alternative holding in Blair is even more suspect because the Eighth Circuit's

reasoning is unsupported by citation to any federal authority. The alternative holding in Blair is nothing more than an unfounded attempt to interpret Beck.

Similarly, Petitioner's reliance on O'Rourke is misplaced because that case involves no direct discussion of Beck. The analysis conducted in O'Rourke is an analysis of trial counsel's failure to request a lesser included offense instruction. The issue in O'Rourke was not a Beck issue, but instead, an ineffective assistance of counsel issue, analyzed in terms of the prejudice prong of the test announced in Strickland v. Washington, 466 U.S. 668 (1984). Consequently, O'Rourke does not provide any support for an alleged split in the Circuits regarding the application of Beck.

Petitioner's reliance on Terry is equally unpersuasive. That case involved a unique set of circumstances not found in this case, Beck, or many other cases. Far from being a persuasive piece of authority that adds to Petitioner's inapplicability argument, Terry is a case decided on an exceptional set of facts.

> Under all of these circumstances, we hold that the rule embodied in *Beck v. Alabama* and its progeny was not violated. Terry's jury was not forced to make an all-or-nothing choice between a guilty verdict for a capital offense and setting Terry free. On the contrary, the jury had several other options [during the first stage deliberations], all of which guaranteed that Terry would serve a sentence of life imprisonment. In short this jury faced virtually the antithesis of an all-or-nothing choice.

Terry, 974 F.2d at 379. This case clearly is inapplicable to the issue in the instant case. Indeed, Terry embraces Respondent's interpretation of Beck. The Third Circuit acknowledged that the all or nothing decision is one made in the first stage of trial between capital murder and acquittal. Moreover, the jury in Terry had sentencing discretion. The Third Circuit failed to make any direct ruling that Beck was inapplicable based solely on the sentencing discretion factor.

Finally, Petitioner's bald assertion that the Tenth Circuit Court of Appeals was wrong to grant habeas relief based on Beck is undermined by an examination of the thoughtful reasoning

applied by the Tenth Circuit to the Beck issue. In Hooks v. Ward, the Tenth Circuit held expressly that Beck applies in Oklahoma even though the jury retains sentencing discretion. The rationale behind the Tenth Circuit's finding is far more detailed, and based on much sounder reasoning, than the few alternative holdings cited by Petitioner.

> Several considerations convince us of the continuing force of *Beck*, even in jurisdictions that permit sentencing discretion. First, much of the language of *Beck* and its progeny is directed toward the enhanced reliability at the guilt phase of a capital case accomplished by giving lesser included instructions supported by the evidence. While *Beck* drew heavily for analogy from the line of cases in which the Court "invalidated procedural rules that tended to diminish the reliability of the sentencing determination," the *Beck* Court added that "[t]he same reasoning must apply to rules that diminish the reliability of the guilt determination." *Beck*, 447 U.S. at 638, 100 S.Ct. 2382 (emphasis added). Throughout *Beck*, the Court focuses on the reliability of the conviction. See, e.g., id. at 637, 100 S.Ct. 2382 ("For when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense ... the failure to give the jury the 'third option' of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction." (emphasis added)).

Hooks, 184 F.2d at 1227 (footnote omitted). The Tenth Circuit's finding that Beck is applicable in Oklahoma, is based on this Court's decision in Beck, as well as later decisions by this Court giving further consideration to Beck-related issues. Hooks, 184 F.3d at 1228-29. The analysis conducted by the Tenth Circuit in Hooks was adopted in the instant case. Hogan v. Gibson, 197 F.3d at 1304. Petitioner's claim the Tenth Circuit's decision to apply Beck is in some way wrong is an argument without basis in fact or law, and should be rejected.

(3) Because the Oklahoma Court of Criminal Appeals did not adjudicate Respondent's Beck claim on the merits, the state appellate court's handling of the Beck issue was not entitled to deference pursuant a proper application of the Anti-terrorism and Effective Death Penalty Act.

Petitioner would have this Court believe the Tenth Circuit erred by failing to defer to the analysis of Beck conducted by the Oklahoma Court of Criminal Appeals. Even a cursory review of the decision reveals the Oklahoma court failed completely in its attempt to apply Beck properly.

Rightfully, the state appellate court's failure was afforded no deference pursuant the AEDPA. Title 28, United States Code § 2254(d)(1).

In reviewing the Beck issue, the Oklahoma Court of Criminal Appeals stated:

> Appellant misreads the holding of the United States Supreme Court. The Court clearly held that the lesser included offense was not required when the evidence did not justify such instruction. It should be noted in this case that the jury was given a lesser included instruction as it related to self-defense and this clearly would be a "third option" for the jury. Beck held unconstitutional an Alabama statute that prohibited lesser included offense instructions in capital cases. That is not the case before us, the jury was instructed and given a lesser included offense option. Therefore, the requirements of Beck and Shad were met.

Hogan v. State, 877 P.2d 1157, 1167 (Okla. Crim. App. 1994). Self-defense is not a lesser included offense of first degree murder in Oklahoma. Self-defense, if believed by a jury, will result in an acquittal. Consequently, self-defense is not the type of "third option" contemplated by Beck. The Tenth Circuit recognized this patent error:

> The Oklahoma Court of Criminal Appeals' rejection of Hogan's *Beck* claim on grounds either that Hogan's self-defense instruction constituted a lesser included instruction, or that the evidence was sufficient to support conviction on the greater charge, is in gross deviation from, and disregard for, the Court's rule in *Beck*.

Hogan v. Gibson, 197 F.3d at 1305. A grossly erroneous reading of dispositive Supreme Court authority is entitled to no deference by a federal court. Title 28, United States Code § 2254(d)(1). Finally, Petitioner's assertion the state appellate court's factual findings were entitled to a presumption of correctness is undermined by the state court's failure to address the central question regarding the sufficiency of the evidence supporting an instruction on the lesser included offense of first degree manslaughter. The Tenth Circuit recognized this failure of the state court as well:

> Because the Oklahoma Court of Criminal Appeals made no findings as to whether Hogan had presented sufficient evidence to warrant a first degree

> manslaughter instruction, it is axiomatic that there are no findings to which we can give deference.

Hogan v. Gibson, 197 F.3d at 1306; and, Title 28, United States Code § 2254(d)(1).

By not applying the law correctly, and by failing to assess the facts correctly, the state appellate court did not conduct a merits review of Respondent's Beck claim. Hogan v. Gibson, 197 F.3d at 1302 n.2. The lack of a merits review by the Oklahoma Court of Criminal Appeals led the Tenth Circuit to conclude correctly that deference should not be afforded to the state appellate court's decision. Consequently, Petitioner's argument to the contrary should be rejected by this Court.

CONCLUSION

Achieving reliability in the determination of a capital murder case is a broad based goal this Court has struggled to fulfill since reinstatement of the death penalty. Beck provides a rule of law that when applied properly assists in bringing reliability to, and ultimately confidence in, the outcome of a capital murder trial. Adopting the arguments of Petitioner would only work to further subvert confidence in an area of law that is already the subject of numerous, and meritorious, attacks. For the foregoing reasons, Respondent, Mr. Kenneth Eugene Hogan, respectfully requests Petitioner's petition for a Writ of Certiorari be denied.

Respectfully submitted,

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